(15)

No. 90-974

In The

Supreme Court of the United States

October Term, 1990

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,

Petitioners,

v.

MATTOX, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS, MATTOX, ET AL.

RONALD A. ZUMBRUN
*ANTHONY T. CASO
DEBORAH J. MARTIN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully moves this Court for leave to file the attached amicus curiae brief in support of respondents, Mattox, *et al.* Consent to the filing of this brief has been granted by counsel for petitioners, Jesse Oliver, *et al.*, and has been lodged with the Clerk of this Court. Respondents, Mattox, *et al.*, and petitioners, League of

United Latin American Citizens, *et al.*, have withheld their consent, thus necessitating the filing of this motion.

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. The Foundation has over 20,000 supporters and contributors throughout the United States, many of whom reside in areas potentially subject to the issue in this case. For this reason, the Foundation submits that it can add a broader perspective to this case which would aid the Court.

PLF believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, the Fifth Circuit Court of Appeals has held that Section 2(b) of the Voting Rights Act, 42 U.S.C. § 1973(2)(b), does not apply to judicial elections. The petitioners would have the judicial election scheme at issue here, which is without discriminatory purpose, trigger the broad remedial powers of the Court in dismantling a judicial election system that has served Texas for over a century, thereby subjecting a state's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

PLF's public policy perspective and litigation experience in the Voting Rights Act arena will provide an additional viewpoint with respect to the issues presented. PLF's brief focuses on the twin concepts of the independence of the judiciary and eradication of bias in the judiciary. Examination of The Federalist Papers and the rules of diversity and removal jurisdiction demonstrates the importance of impartial, rather than representative, judges. None of the parties in this action have taken this approach to the issue, yet the arguments are relevant to the disposition of this case.

PLF participated in an earlier Voting Rights Act case before this Court, *Rome v. United States*, 446 U.S. 156 (1980) (a Section 5 case dealing with municipal annexations), and is submitting an amicus brief in *Chisom v. Roemer* concurrent with this brief. PLF believes the Fifth Circuit correctly analyzed the holdings of this Court and lower courts which exclude judges from the term "representatives."

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: April 1, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
DEBORAH J. MARTIN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By _____
ANTHONY T. CASO

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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INTERESTS OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990). The case concerned the at-large election of Texas trial court judges. The court held that when Congress amended the Voting Rights Act to add a results test for dilution of minority voting strength in elections for "representatives," it did not intend the amendment to apply to judicial elections.

INTRODUCTION

The stated goal of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(2), is to prevent racial discrimination at the polls so that minorities can "elect *representatives* of their choice." *Id.* (emphasis added). The term "representatives," as used in Section 2, should be limited to state officials who make law, and not extended to those who interpret it. Judges do not represent the special interests of any constituency and certainly not the special interests of any racial group. Their function is to administer justice fairly, efficiently, and impartially for all. States have never drawn judicial districts so as to recognize the special interests of any group of citizens in the community.

The function of courts is to ensure equal protection under the law and due process for all. Judicial election schemes are tailored to serve those ends. If judges are held to be "representatives," the interlocking web of jurisdiction, venue, docket control, jury venire, and

accountability of judges to their electorate is subordinated to the notion that the special interests of minority voters should be given particular attention. *Clark v. Edwards*, 725 F. Supp. 285, 294 (M.D. La. 1988), *vacated by Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *probable jurisdiction for appeal noted by Clark v. Roemer*, 59 U.S.L.W. 3496 (Jan. 18, 1991). Petitioners have not explained what special interests of minority voters require "representation" in the judiciary or in what way the elected judiciary fails to respond to minority interests.

The application of Section 2 to judicial elections has the potential for a tremendous impact on many states' electoral systems. Remedial measures resulting from such application may force the invalidation of judicial electoral systems. Such invalidation substitutes judicial judgment for that of the citizens as to what their forms of government should be. By doing so, federal courts will overstep the boundaries mandated by federalism. Congress did not extend Section 2 to *all* electoral practices and systems but only to the election of *representatives* from multi-member districts.

Elections for representatives in which vote dilution has been shown can be cured by redistricting under the one-man, one-vote principle. In the case of elections for representatives, such a cure does not destroy the function of the office, invalidate the system, or infringe other constitutional rights or guarantees. On the other hand, these evils may well come to pass as a result of redistricting in the judicial election context.

SUMMARY OF THE ARGUMENT

Section 2(b) of the Voting Rights Act (Act), which permits use of a "results test" to prove violation of the Act, applies only to the election of representatives. Judges, whether at the trial level, appellate level, or the court of last resort, are not representatives. They do not have a constituency, do not necessarily reflect the views of those who elect them, and should not.

The linchpin of the American judiciary is the impartiality of its judges. Litigants must abide by decisions whether they agree with them or not. By requiring judges to "reflect," "be responsive to," or "represent" a discrete constituency, the impartiality that is crucial to the administration of justice is lost. Far from representing a particular group of people, the judiciary is meant to be the antimajoritarian branch of government. Equating the judiciary with the truly representative branches of government destroys the check the judiciary has over those branches.

The state and federal courts have long been wary of any appearance of bias in their ranks. The creation of diversity jurisdiction came about in an effort to aid litigants who might suffer from local prejudices. Removal jurisdiction exists for the same reason. With all the federal courts have accomplished to eradicate bias, this Court should not take a step backward by connecting judges inextricably to their electors.

Many states elect judges on a district-wide basis. The reasons for this are numerous and sound. They include geographical compactness, administrative control, and a

correlation with venue statutes. The expansion of Section 2(b) to judicial elections would devastate the judicial election systems in these states; states in which no intentional discrimination has occurred. This Court should respect the boundaries set by federalism and continue to permit states to elect their own judiciary by their own preference.

ARGUMENT

I

VOTING RIGHTS ACT § 2(B) IMPLEMENTED A "RESULTS TEST" WHICH APPLIES ONLY TO "REPRESENTATIVES" AND JUDGES ARE NOT "REPRESENTATIVES"

By dividing a county into subdistricts, a federal court dramatically alters an elected judge's independence and appearance of impartiality. Rather than enjoying the independence that accompanies accountability to the entire electorate, he would be rendered beholden to a small portion of those appearing before the court. Rather than being free to eradicate a nuisance in his neighborhood, the judge may be pressured to allow that nuisance to continue if he intends to remain in office.

A. Judges Must Be Impartial Decision Makers, Accountable to No Individual or Special Interest Group

An elector has no guarantee that a civil suit or criminal prosecution involving him will be brought before a judge he voted for. In fact, chances are much greater that a litigant or defendant will be brought before a judge

with whom he has no connection whatsoever. That lack of connection is the linchpin of impartial justice. The American judicial system relies on citizens to abide voluntarily by court rulings, whether or not they agree or disagree with such rulings. It is therefore of fundamental importance that the judges handing down the rulings be perceived as being fair and unbiased.

Although petitioners seek subdistricting to improve judges' responsiveness to minorities, creating subdistricts will not have the same impact on minority representation as it has in legislative elections. In legislative and administrative elections, officials are elected from a political subdivision to represent their constituents. The elected officials become part of a political decision-making body, such as a city council, school board, or legislature. Elected representatives form a collegial body charged with the responsibility of making decisions that reflect the policy preferences of their constituents. In the legislative/administrative context, single-member district elections ensure racial and language minority groups in the district do not suffer vote dilution. However, in judicial districts, even in districts with two or more judges, District Court judges do not act as a group. Each judge is responsible for a specific proportion of the caseload. Judges do not negotiate, discuss, compromise, or engage in give-and-take when deciding cases. Each judge acts alone in applying the law to the case at hand.

Subdistricting robs judges of their independence by focusing a very narrow public opinion over their decision-making process. Do petitioners really want judges responsive to public opinion in their districts? Public opinion is an uncertain and constantly shifting

barometer of community emotion. Public opinion gives little consideration to the determinations of law and fact at issue in a case. Public opinion is concerned solely with results. Certainly, most judges set aside concern for their reelection standing and render decisions without regard for such considerations. However, a party on the losing side of a court decision or ruling affecting life, liberty, or property should not be left to wonder whether that decision or ruling was influenced by public opinion and prospects for reelection.

B. The Judiciary Performs an Antimajoritarian Role

The Framers of the Constitution intended judges and legislative representatives to be treated differently under the law. These officials are provided for in different articles in the body of the Constitution. U.S. Const. Arts. I and III. Further, the difference between legislative representatives, who curry favor with their constituents, and judges, who do not, is accentuated by the Framers' recital of the duties and prohibitions of the respective offices. The executive and legislative branches are subject to an elaborate system of rules while the judiciary is not. The plain meaning of the word "representative" cannot be strained to encompass judges, who simply do not have a constituency. Judges, be they trial or appellate, should apply the law as they see it, without a political agenda or interest.

Alexander Hamilton, in a sequence of Federalist Papers, stressed the importance of an independent judiciary. Far from equating judicial officers with "representatives," he expressed concern that the judiciary be free

from the "encroachments and oppressions" of the representative body. The Federalist No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961). The independent judiciary was held up to be "the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws." *Id.*

Not only was the judicial branch created to be non-representative, but Hamilton asserted that " 'there is no liberty if the power of judging be not separated from the legislative and executive powers.' " *Id.* at 466 (quoting Montesquieu, *Spirit of Laws*, Vol. 1, at 186 (1750)). Furthermore, Hamilton was fully aware of the ever-changing whims of public opinion. Hence, the antimajoritarian role of the judiciary is clear:

> "[I]t is not to be inferred . . . that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the . . . Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body." *Id.* at 469-70.

Hamilton cautioned strongly against allowing an independent judiciary to be infiltrated by a sense of responsiveness to segments of the community. It is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community. *Id.* at 470.

Necessarily, judges' decisions may not reflect the majority will. Their decisions often must enforce constitutional guarantees in the face of majority opposition. To fulfill this role, judges should be motivated solely by principle, not by perceived ties to constituents.

> "Few of us would want an electorate that thought there were no differences at all between judging and political activity. To erode the perception of this distinction is dangerous; it risks result-oriented adjudication independent of any satisfactory rule structure . . . . The continuing perception of an institution of electing or removing judges may over time weaken the idea that adjudication ordinarily is sharply different from doing politics."[1]

A judge should never have to worry that an unpopular decision alone will cast him out of the judiciary.

C. Federal Rules Have Provided Great Protection Against Any Possibility of Bias

The creation of diversity jurisdiction and the ability of defendants to remove cases to federal court are based on the concern that local litigants could benefit from a hearing before a local judge. The Federalist Papers Nos. 80 and 81 emphasize this point: "[J]udicial authority of the Union ought to extend to . . . cases . . . in which the State tribunals cannot be supposed to be impartial and unbiased." The Federalist No. 80, at 475 (A. Hamilton). This is necessary because "the most discerning cannot

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[1] Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. Cal. L. Rev. 1555, 1559 (1988).

foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of natural causes." The Federalist No. 81, at 486 (A. Hamilton).

The historical basis of diversity jurisdiction was to protect nondomiciliaries from local prejudice. *Betar v. DeHavilland Aircraft of Canada, Ltd.*, 603 F.2d 30, 35 (7th Cir. 1979), *cert. denied*, 444 U.S. 1098, *reh'g denied*, 445 U.S. 947 (1980). The theory on which jurisdiction is conferred on federal courts in controversies between citizens of the different states has its foundation in the supposition that the state tribunal may not be impartial between its own citizens and nonresidents. *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856).

At one time the removal jurisdiction statute, 28 U.S.C. § 1441, expressly listed local bias as a reason for removal. 28 U.S.C.A. § 1441, historical note. All of the provisions with reference to removal because of the inability, due to prejudice or local influence, to obtain justice, have since been discarded. The historical note to Section 1441 explains that "[t]hese provisions, born of the bitter sectional feelings engendered by the Civil War and the Reconstruction period, have no place in the jurisprudence of a nation since united by three wars against foreign powers." *Id.* So much has been done to eradicate biases; the subdistricting of judicial election districts is a swing in the wrong direction.

"Representative judges" would encourage forum shopping, as litigants would use whatever means at their disposal to obtain a judge from a part of the county with views similar to their own. One of the major purposes of

this Court's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1937), was to eliminate or drastically curtail the evil of forum shopping. *Id.* at 74-75. The twin aims of the *Erie* rule were characterized by this Court as "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The *Hanna* decision viewed *Erie* as a reaction to the practice of forum shopping that developed in the wake of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Hanna*, 380 U.S. at 467. *See Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (diversity jurisdiction existed although plaintiff reincorporated solely to create diversity); *see also O'Brien v. Avco Corp.*, 425 F.2d 1030, 1036 (2d Cir. 1969) (administrator was appointed to secure a federal forum because of alleged prejudice in state court; federal court viewed appointment "as a blatant example of precisely the type of forum-shopping that [the anti-collusion statute] and cases like *Erie R.R. Co. v. Tompkins* . . . were designed to prevent").

No right exists for litigants to vote on the particular judges who may hear their cases. As it is now, citizens are often in court in civil or criminal cases in jurisdictions where they do not live or vote, yet none has ever been able to challenge a judge's authority because the citizen had no opportunity to vote for that judge.

II

THE IMPACT OF EXPANDING VOTING RIGHTS ACT § 2(B) TO JUDICIAL ELECTIONS WOULD BE DEVASTATING TO THE MANY STATES THAT ELECT JUDGES ON A COUNTY-WIDE BASIS

Texas' use of the county-wide election system ensures that each district judge is elected by and accountable to every citizen of the county. Each judge has jurisdiction over cases arising anywhere in the county. Venue over each case is county-wide. The relevant community for jury selection is the county. Specialized courts and docket-equalization procedures are exercised county-wide.

Electing state district judges from single-member districts would destroy the integrity of the unit. Decision making would become fragmented along the same lines as the districts into which the unit is carved. The judge would not reflect values of the whole community. Judicial elections are unique compared to elections for legislative and administrative offices. Judicial elections are distinguished by lower levels of turnout and voter roll-off, less competition and greater reliance by the voters on factors such as incumbency, previous judicial experience, and party affiliation in making choices among competing candidates. Weber, *The Voting Rights Act and Judicial Elections Litigations: The Defendant States' Perspective*, 73 Judicature 85, 86 (1989). Thus, this Court should exercise caution in reaching conclusions about voter polarization and dilution in judicial elections based on past experience with elections for legislative and executive offices.

Minorities have already challenged state judicial election systems in Georgia, Illinois, Alabama, North Carolina, Ohio, Mississippi, and Florida[2] in addition to the Texas and Louisiana cases currently before this Court. Each state that elects judges has its own method of doing so, be it by county-wide elections, by district, or some other method. California, like Texas, elects judges on a county-wide basis. If Section 2 is applied to judicial elections in Texas and Louisiana, the trend would undoubtedly spread to California. Consider the County of San Francisco. The result of splitting up that county would result in small, homogenous constituencies, *e.g.*, the Haight-Ashbury District, the Marina District, and the Nob Hill District. These subdistricts, which would be smaller and contain fewer voters than the existing districts, would intolerably exacerbate political pressures on judges.

In Texas, judges in certain counties run for a particular bench (*e.g.*, civil, criminal, family, or juvenile). Texas established that system because it permits campaigning candidates to declare their qualifications for the particular bench they seek. Supplemental Brief of Appellant Dallas County Criminal District Judge F. Harold Entz, at 6, *League of United Latin American Citizens (LULAC) v.*

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[2] *Brooks v. Glynn County, Georgia, Board of Elections*, 1989 WL 180759 (S.D. Ga. 1989); *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1988); *Alexander v. Martin*, 86-0148-CIV-5 (E.D. N.C. 1987); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); and *AlHakim v. State of Florida*, 88-14165-CIV-T-10"A" (M.D. Fla. 1988).

Dallas County District Judge F. Harold Entz, in the United States Court of Appeals for the Fifth Circuit, No. 90-8014. Remedial measures imposed by federal courts to cure a Section 2 violation may totally rework the state system to such an extent that state citizens no longer even recognize the system their elected state representatives established. In a case where no intentional discrimination exists, a federal court should not dramatically alter a state system. Wholesale changes or intrusive alterations of the nature and operation of a state's judicial branch violates the principles of federalism.

CONCLUSION

To ascribe particular sets of views to judges because of the color of their skin is clearly in error. Yet the petitioners here seem to believe that only a member of a minority group will be responsive to the interests of that group. If this Court determines that state judicial elections are subject to Section 2, and if single-member or smaller multi-member judicial districts, some with majority black populations, are created as a remedy, then state court judges will be held accountable, as "representatives," to a smaller, more ethnically and racially homogenous population.

Requiring judges to be "representatives" insults not only the judges who sit on the state and federal benches, but the entire electorate. To hold, in effect, that a black litigant is more likely to receive a sympathetic ear from a black judge, who will not ignore minority interests, *Thornburg v. Gingles*, 478 U.S. 30, 48 n.14 (1986), impugns

the integrity of both black and nonblack judges. Judges of all races, creeds, and colors are presumed to be impartial; presumed to decide cases on the merits, not on the color or political persuasion of the litigants. Moreover, the judges composing the entire judiciary of a state is far from homogenous in philosophy, political leanings, and view of the law and its application. Therefore, the exemption that Congress carved out of the Voting Rights Act for judicial elections should be upheld, and the Fifth Circuit's opinion should be affirmed.

DATED: April, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
DEBORAH J. MARTIN
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation